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IN THE

SUPREME COURT OF THE UNITED STATES

NO. 346
October Term, 1970

* * *

DR. GEORGE J. BETO, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Appellant-Respondent

V.

ROBERT CHESTER GALLOWAY,
Appellee-Petitioner

* * *

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * *

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * *

The State of Texas prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on January 6, 1970.

OPINION BELOW

The opinion delivered in the court below is reported at 421 F.2d 284 (1970) and is appended to this Petition as Appendix "A". The opinion of the United States District Court for the Northern District of Texas is reported at 296 F.Supp. 230 (1969), and a copy thereof is appended hereto as Appendix "B". A Stay of Mandate was granted by the United States Court of Appeals to and including July 7, 1970.

JURISDICTION

As indicated above, the opinion of the United States Court of Appeals was entered on January 6, 1970. (See Appendix "A"). The State of Texas thereafter, on January 16, 1970, filed a Petition for Rehearing with the suggestion that such petition be heard en banc, and said petition was denied April 8, 1970. (See Appendix "C").

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED.

Is a lower federal court bound by the interpretation placed on Texas murder statute for almost half a century by the highest court in this state, or, is the federal court free to exercise an independent judgment as to what the interpretation of a state statute is or should be?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article IV., Section 4 of the Constitution of the United States provides:

> "Section 4. The United States shall guarantee to every State in this Union a Republican Form of Government . . ."

The Fifth Amendment provides:

> "AMENDMENT V –
>
> CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

TEXAS PENAL CODE (Vernon 1948). Volume 2A, page 633:

"Article 1256. (1140) (710) (605) 'Murder'

"Whoever shall voluntarily kill any person within this State shall be guilty of murder. Murder shall be distinguished from every other species of homicide by the absence of circumstances which reduce the offense to negligent homicide or which excuse or justify the killing. O.C. 607; Act Feb. 12, 1858; Acts 1913, p. 238; Acts 1927, 40th Leg., p. 412, ch. 274, §1."

TEXAS PENAL CODE (Vernon 1948). Volume 2A, page 738:

"Article 1257. (1141) (711) (606) Punishment for murder

"The punishment for murder shall be death or confinement in the penitentiary for life or for any term of years not less than two. O.C. 607; Act Feb. 12, 1858; Acts 1913, p. 238; Acts 1927, 40th Leg., p. 412, ch. 274, §1."

TEXAS PENAL CODE (Vernon 1948). Volume 2A, page 742:

"Art. 1257a. Evidence

"In all prosecutions for felonious homicide the State or the defendant shall be permitted to offer testimony as to all relevant facts and circumstances surrounding the killing and the previous relationship existing between the accused and the deceased, together with all relevant facts and circumstances going to show the condition of the mind of the accused at the time of the homicide, which may be considered by the jury in determining the punishment to be assessed. Provided, however, that in all convictions under this Act and where the punishment assessed by the jury does not exceed five years, the defendant shall have the benefits of the suspended sentence act. Acts 1927, 40th Leg., p. 412, ch. 274 §2."

TEXAS PENAL CODE (Vernon 1948), Volume 2A, page 760:

"Art. 1257b. Instructions

"In all cases tried under the provisions of this Act, it shall be the duty of the court to define 'malice aforethought' and shall apply that term by appropriate charge to the facts in the case and shall instruct the jury that unless from all the facts and circumstances in evidence the jury believes the defendant was prompted and acted with his malice aforethought, they cannot assess the punishment at a period longer than five years; provided, however, that no offense committed prior to the taking effect of Chapter 274 of the General Laws of the 40th Legislature of 1927, shall be affected hereby whether an indictment has been returned or not, but in every such case the offender may be proceeded against and punished under the law as it existed prior to the taking effect of said act, the same as if said act had not been passed. Acts 1927, 40th Leg., p. 412, ch. 274, §3a; Acts 1927, 40th Leg., 1st C.S., p. 18, ch. 8, §1."

TEXAS PENAL CODE (Vernon 1948), Volume 2A, page 764:

"Art. 1257c. Instructions on issue of murder without malice

"In all cases tried under the provisions of this Act it shall be the duty of the Court, where the facts present the issue of murder without malice, to instruct the jury that murder without malice is a voluntary homicide committed without justification or excuse under the immediate influence of a sudden passion arising from an adequate cause, by which it is meant such cause as would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper sufficient to render the mind incapable of cool reflection, and in appropriate terms in the charge to apply the law to the facts as developed from the evidence. Acts 1927, 40th Leg., p. 412, ch. 274, §3b, added Acts 1931, 42nd Leg., p. 94, ch. 60, §1."

STATEMENT OF THE CASE

Galloway was charged in a Texas state court with murder as a result of a nightclub slaying, and on May 23, 1966, was placed on trial in the Criminal District Court of Dallas County, Texas. The jury found him guilty of murder without malice, and under the applicable Texas law, viz., Texas Code of Criminal Procedure (Vernon 1965, as amended), Article 37.07, (2)(b) and (d), (set out as Appendix "D"), Galloway was provided a choice as to whether he preferred the judge or the jury assess his punishment. Galloway, in writing, chose the jury to be the arbiter of his punishment. After further deliberation on the punishment aspect alone, however, from 4:20 P.M. on May 24, 1966, until 11:00 A.M. on May 25, 1966, the jury was unable to agree upon the amount of punishment. Thereafter, with the consent of the defense attorney, the jury was discharged

by the Court. Such procedure was authorized by Articles 37.07(2)(d), 36.31, 36.32, and 36.33, Texas Code of Criminal Procedure, supra.

On June 23, 1966, without having plead former jeopardy, (as is required by Articles 27.05 & 27.06 of the Texas Code of Criminal Procedure), or having made any attempt to offer evidence in support of such a plea, Galloway was tried again under the same indictment and found guilty, this time of murder with malice, and was assessed as punishment (20) years confinement in the State penitentiary.

Galloway appealed his conviction to the Texas Court of Criminal Appeals, and Judge John F. Onion, Jr., writing for a unanimous court, held that his plea of former jeopardy was not before the Court and further observed that even if it were, under Texas law, Galloway had not been twice put in jeopardy.

The Texas Court of Criminal Appeals Opinion is reported at 420 S.W.2d 721 (1967); reh.den. (1967), and a copy thereof is appended hereto as Appendix "E".

On January 22, 1968, Galloway made Application for Writ of Habeas Corpus to the convicting court, i.e., the Criminal District Court of Dallas County, Texas, but relief was denied by the trial judge. The Court of Criminal Appeals examined the trial court's record and denied relief without written opinion. All of the points raised in both the state and the federal habeas corpus proceedings were presented to the Texas Court of Criminal Appeals on appeal and were covered in the opinion of that court.

On June 20, 1968, Galloway, again alleging substantially the same grounds, applied to the United States District

Court for the Northern District of Texas for a Writ of Habeas Corpus and on February 12, 1969, the Honorable Sarah T. Hughes granted him relief. Judge Hughes' opinion declares that it is fundamentally unfair, according to present day values, to allow the State two chances to convict an accused of the same offense. Further, in reaching her decision, Judge Hughes struck down Article 37.07(2)(d), of the Texas Code of Criminal Procedure (Vernon 1965, as amended) as being violative of the Due Process Clause of the United States Constitution. Unfortunately, the United States Court of Appeals in affirming the judgment of the district court below, provides the State of Texas no clue as to whether it concurs in the decision of the lower court that Article 37.07(2)(d), C.C.P., supra, is unconstitutional.

Parenthetically, the highest state court ruled that the right to raise the federal question, i.e., that of double jeopardy, had been waived by Galloway for non-compliance with state procedural rules, (see Opinion of Texas Court of Criminal Appeals, Appendix "E"), but the United States Court of Appeals disagreed. It held that *Benton v. Maryland*, 395 U.S. 784 (1969), decided after Galloway's conviction, wiped out all procedural barriers that had stood in the way of his defense; applied *Benton v. Maryland* retroactively, and expressly precluded, as having been a barrier, defense counsel's written consent to the declaration of mistrial.

REASONS FOR GRANTING THE WRIT

I.

A review on writ of certiorari should be granted where a Court of Appeals has decided an important state question in a way in conflict with applicable state law. Supreme

Court Rule 19. Such is precisely the situation here, *FOR SHOULD THE OPINION OF THE FIFTH CIRCUIT STAND, SERIOUS QUESTIONS AS TO WHETHER TEXAS HAS A VALID STATUTE DEFINING THE OFFENSE OF MURDER WITH MALICE WILL ARISE.* Such predicament is occasioned by the total disregard of a lower federal court of Texas' interpretation of its murder law, enunciated in decisions spanning forty-three (43) years of time. Texas, being a state, is permitted to define its crimes, and since 1927 Texas' highest court has defined murder as one crime with two different ranges of punishment depending upon the presence or absence of malice. See 29 Tex.Jur.2d 83, 84, Homicide, Section 77, appended hereto as Appendix "F". Also see 61 A.L.R.2d 1141, Section 11(b), page 1185, and cases there cited. Appended hereto additionally, and denominated Appendix "G", is a history of the murder law in this state, including styles and citations of cases in which the Texas Court of Criminal Appeals has uniformly held murder to be one crime.

Nothing whatsoever appears in the federal constitution to estop the people of a state from enacting, if they see fit, one murder statute as Texas has done with varying degrees of punishment. Such construction by the state courts of their statutes is, and should be, binding on the federal courts and they should be permitted neither to deny the correctness of the state construction nor repudiate its binding force. In the landmark case of *Erie Railroad Co. v. Thompkins,* 304 U.S. 64, (1938), this Court established a doctrine which has been the law of the land from 1938 until today. Mr. Justice Brandeis, speaking for a majority of the court, set forth the rule:

> ". . . Except in matters governed by the federal constitution or by acts of Congress, the law to be applied in any case is the law of the State. And whether

> the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. And no clause in the Constitution purports to confer such a power upon the federal courts . . ."

The problem, however, arises because the United States Court of Appeals in *this* case said: "*THERE CAN BE LITTLE DOUBT THAT MURDER WITH MALICE AND MURDER WITHOUT MALICE ARE SEPARATE AND DISTINCT OFFENSES UNDER TEXAS LAW.*" (Emphasis added). Such holding, as aforesaid, is directly contrary to the uniform unanimous opinions of the Texas Court of Criminal Appeals.[1] When the jury finds the defendant guilty of murder, their duty is to characterize the offense as being murder WITHOUT malice aforethought if they FURTHER believe, or have a reasonable doubt, that at the time the defendent committed such offense he was then under the immediate influence of sudden passion arising from an adequate cause. If the jury, after finding defendant guilty of murder, do not believe, or have a reasonable doubt, that he was at the time of its commission then under the immediate influence of sudden passion

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[1]*Lovelady v. State*, 193 S.W.2d 570 (Tex. Crim. 1946) ("Degrees of the crime of murder do not exist under our present statute . . . Every intentional killing without justification or excuse is murder. The issue of malice arises only as to the question of punishment."); *Lopez v. State*, 286 S.W.2d 424, 425 (Tex. Crim. 1957) (". . . the question of malice relates only to penalty and is not a part of the offense.").

[2]*Brewer v. State*, 157 S.W.2d 388,390 (Tex. Crim. 1942) ("To constitute an unlawful killing one without malice, the burden is not upon the accused to prove the mitigating circumstances distinguishing same from murder with malice; but, he is entitled to have the punishment affixed to that of murder without malice if there be evidence which produces in the mind of the jury a reasonable doubt as to the existence of the mitigating circumstances.")

arising from adequate cause, then, in that event, the offense must, as a matter of law, be characterized as murder WITH malice aforethought because, under the present laws with respect to murder, *every* murder, no matter how committed and no matter what ACTUAL state of mind was possessed by defendant, is classified as murder with malice aforethought if committed at a time when defendant was NOT under the immediate influence of sudden passion from adequate cause.

The Appellant herein is not unaware of the decision of this court rendered in *Price v. Georgia,* ____ U.S. ____, (No. 269, decided June 15, 1970.) Indeed, the State of Texas is in complete accord with the correctness of such opinion. In Georgia, *unlike Texas,* manslaughter is a lesser included offense of murder, and as aforesaid, such is *not* the case here. The Texas Legislature enacted one murder statute, and our highest criminal court has consistently held that the crime of murder is *one crime alone.* At issue in *Maxwell v. Bishop,* 7 Cr.L. 3099, was whether or not a state must provide standards or guidelines for a jury to use in assessing punishment. Such precisely is what the Texas law does here relative to the presence or absence of malice in cases of murder. If malice is found to be present a greater amount of punishment is authorized, and conversely, if malice is found to be absent the maximum sentence prescribed by statute is less. Significant, though, is that the

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Lopez v. State, 216 S.W.2d 183, 185 (Tex. Crim. 1949) ("When an unlawful killing takes place, whether it be upon express malice or implied malice, it is murder. In the absence of any evidence showing express malice the law implies malice and the killing, under such circumstances, is murder although no previous ill will or hatred is shown. In order to bring a case within the category of murder without malice it must be shown that adequate cause, as that term is defined by Art. 1257c . . . existed, which is to be determined by the jury and not by the court.").

presence or absence of malice only provides the guidelines, and *MURDER REMAINS ONE CRIME ALONE.*

Had Texas law been applied in this case the constitutional issues of double jeopardy would never have been raised at all, for in order to reach a double jeopardy question, the federal courts had to obliterate Texas' interpretation of its law and create a "two distinct offenses" theory.

II.

In addition to the reason set forth above, as to why the federal courts should not have set aside Galloway's conviction, there remain two other compelling reasons why the court below erred.

A. Article 37.07(2)(d), C.C.P., supra, the section declared by the District Court to be unconstitutional, provides:

"...

> "(d) In cases where the matter of punishment is referred to the jury, the verdict shall not be complete until the jury has rendered a verdict both on the guilt or innocence of the defendant and the amount of punishment, where the jury finds the defendant guilty. In the event the jury shall fail to agree, a mistrial shall be declared, the jury shall be discharged, and no jeopardy shall attach."

The conclusion is inescapable, according to the terms of the statute, that no final verdict of murder without malice was adjudged against Galloway at his first trial. *Jeopardy does NOT attach where there has been no legal verdict prior to the discharge of the jury.* It has been uniformly held that if the jury, in a federal criminal prosecution, is discharged because of its inability to agree on a verdict, a

retrial of the accused for the same offense by another jury does not violate the double jeopardy provision of the Fifth Amendment. So hold *Green v. U.S.*, 355 U.S. 184 (1957); *Wade v. Hunter*, 336 U.S. 684 (1949); *Keerl v. Montana*, 213 U.S. 135 (1909); *Dreyer v. Illinois*, 187 U.S. 71 (1902); *Selvester v. U.S.*, 170 U.S. 262 (1898); and *Logan v. U.S.*, 144 U.S. 263 (1892). It was further held, in the leading case of *U.S. v. Perez*, 9 Wheat 579, 6 L.Ed. 165 (1824), in which the jury was unable to agree and was discharged *without the prisoner's consent*, (unlike the case at bar), that a subsequent trial for the same offense was not barred. The Supreme Court there said:

> "We think that in all cases of this nature the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated" and "that such a discharge constitutes no bar to further proceedings and gives no right of exemption to the prisoner from being again put upon trial."

This clear statement of the law has been consistently followed by the federal courts for more than 140 years.

Indeed, one of the cases relied on by the United States Court of Appeals in its opinion is *Downum v. U.S.*, 372 U.S. 734 (1962) which provides that an accused is not twice put in jeopardy within the meaning of the Fifth Amendment when tried a second time after a jury, impaneled for the first trial, has been discharged for failure to agree on a verdict.

Not only does jeopardy not attach where there is *no legal verdict*, it does not even attach if a verdict *is* returned by a jury, and such verdict is defective. The cases have

held that the trial court may set aside the verdict, direct that the accused be retried, and that such retrial does not violate the double jeopardy provision of the Fifth Amendment. *Oelke v. U.S.*, 389 F.2d 668 (9th Cir. 1967); cert. den. 390 U.S. 1029; *Crawford v. U.S.*, 285 F.2d 661 (D.C. Cir., 1960).

Had Galloway's trial occurred prior to the time the Texas Code of Criminal Procedure was amended to provide an accused a bifurcated trial, i.e., a separate hearing on the punishment aspect alone, — separate, apart, and subsequent to the hearing of the issue of guilt, Galloway's facts would have produced no question at all. This is true because had the single hearing procedure been used at trial, (guilt or innocence *and* punishment being determined at one time), it would not have been known whether the jury reached agreement on *any* issue including, of course, the issue of guilt, prior to the time they were discharged for their inability to agree.

Surely the State of Texas should not be penalized for complying with the terms of a procedure Galloway had selected and one which the Texas Legislature had theretofore enacted solely for the benefit of an accused.

B. Lastly, even if the double jeopardy question is faced, *Benton v. Maryland*, supra, can be, and should be, distinguished from the case at bar. In the *Benton* case the defendant was charged with burglary and larceny. He was expressly found "not guilty" of larceny, but received ten years for burglary. He appealed his burglary conviction, and subsequently was again charged with burglary and larceny. By filing a Motion to Dismiss, Petitioner in that case complained that a retrial for larceny subjected him to double jeopardy, and the Supreme Court agreed. Of crucial

significance, however, was the fact that Benton was twice convicted of burglary, and neither did he contend double jeopardy, nor did the Supreme Court object to his twice being convicted for burglary. The fault lay, however, with his being re-tried for larceny after having previously been expressly acquitted. Such situation is not present here.

CONCLUSION

The decision reached in this case reveals the exercise of an unconstitutional assumption of power by the Courts of the United States and if permitted to stand, in effect, overrules *Erie v. Thompson*, supra. For the above and foregoing reasons, the Petition for Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jo Betsy Lewallen Szebehely, a member of the Bar of the Supreme Court of the United States, do hereby certify that a copy of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been served on counsel for the Appellee-Petitioner by depositing same in the United States Mail, postage prepaid, addressed to Mr. Fred Time, Attorney at Law, 714 Praetorian Building, 1607 Main Street, Dallas, Texas 75201, this the ____ day of July, 1970.

JO BETSY LEWALLEN SZEBEHELY
Assistant Attorney General

APPENDIX "A"

Robert Chester GALLOWAY, Plaintiff-Appellee.

v.

Dr. George J. BETO, Director, Texas Department of Corrections, Defendant-Appellant.
No. 27461.

United States Court of Appeals
Fifth Circuit.
Jan. 6, 1970.

Habeas corpus proceeding was brought by state prisoner. The United States District Court for the Northern District of Texas, at Dallas, Sarah Tilghman Hughes, J., 296 F. Supp. 230, rendered judgment in favor of prisoner, and appeal was taken. The Court of Appeals, Godbold, Circuit Judge, held that where prisoner as defendant in Texas state court was charged with murder, including both murder with malice and murder without malice, and verdict held that he was guilty of murder without malice but was silent as to charge of murder with malice, and mistrial was declared because jury was unable to agree on punishment, his retrial for murder with malice constituted double jeopardy in violation of Federal Constitution.

Affirmed.

1. Courts, Key No. 100(1)

Rule of United States Supreme Court that state convictions must be judged under United States Supreme Court's double jeopardy provision is to be applied retroactively to retrials held before opinion of United State Supreme Court was handed down. U.S.C.A.Const. Amends. 5, 14.

2. Criminal Law, Key No. 185

Where defendant in Texas state court was charged with murder, including both murder with malice and murder without malice, and verdict held that defendant was guilty of murder without malice but was silent as to charge of murder with malice, and mistrial was declared because jury was unable to agree on punishment, retrial of defendant for murder with malice constituted double jeopardy in violation of Federal Constitution. U.S.C.A.Const. Amend. 14; Vernon's Ann.Tex.C.C.P. art. 37.07, subd. 2(b, d).

3. Criminal Law, Key No. 867

Mistrial may be followed by retrial only in very extraordinary and striking circumstances.

4. Criminal Law, Key No. 183

Defense counsel's written consent to mistrial does not amount to waiver of double jeopardy plea. U.S.C.A.Const. Amends. 5, 14.

5. Criminal Law, Key No. 290

Failure of defendant to comply with Texas procedure for raising plea of double jeopardy did not bar assertion of federal defense of double jeopardy. U.S.C.A.Const. Amends. 5, 14.

6. Criminal Law, Key No. 292(1)

Where defendant in Texas state court was charged with murder, including both murder with malice and murder without malice, and verdict held that defendant was guilty of murder without malice but was silent as to charge of murder with malice, and mistrial was declared because jury was unable to agree on punishment, and defendant was re-

tried for murder with malice, defendant sufficiently raised issue of double jeopardy by pretrial motion to strike part of indictment charging defendant with murder with malice and by his submission of affidavits relating circumstances of first trial. U.S.C.A.Const. Amends. 5, 14.

7. Courts, Key No. 359

Federal Court of Appeals is bound not by pronouncements of Texas courts on double jeopardy effect of a retrial of murder with malice, but by Texas law on relationship of the two offenses as it affects implied acquittal doctrine. U.S.C.A.Const. Amends. 5, 14.

8. Homicide, Key No. 11

Murder with malice and murder without malice are separate and distinct offenses under Texas law. Vernon's Ann. Tex.P.C. art. 1256.

9. Homicide, Key No. 231

In prosecution for murder with malice, once defendant satisfies his burden of going forward with evidence of lack of malice, state must prove beyond reasonable doubt that defendant acted with malice aforethough. Vernon's Ann. Tex.P.C. art. 1256.

10. Homicide, Key No. 250

Where defendant is charged with murder with malice, and state proves every element in case but malice, it proves murder without malice. Vernon's Ann.Tex.P.C. art. 1256.

Crawford C. Martin, Atty. Gen. of Tex., Howard M. Fender, Jo Betsy Lewallen, Asst. Attys. Gen., Nola White, First Asst. Atty. Gen.; Hawthorne Phillips, Executive Asst.

Atty. Gen., W. V. Geppert, Staff Legal Asst. Atty. Gen., Robert C. Flowers, Asst. Atty. Gen., Austin, Tex., for appellant.

Fred Time, Marks, Time & Aranson, Dallas, Tex., for appellee.

Before THORNBERRY, GODBOLD and MORGAN, Circuit Judges.

GODBOLD, Circuit Judge:

Galloway was charged in Texas state court with murder, including both murder with malice and murder without malice, as a result of a nightclub slaying. The jury brought in a verdict of guilty of murder without malice, which carries a maximum statutory penalty of five years in Texas. The verdict was silent as to the charge of murder with malice.

Galloway requested in accordance with Texas Procedure,[1] that his sentence be fixed by the jury which had found him guilty. After several hours of deliberation the jury, still unable to agree on punishment, was discharged by the trial judge with the written consent of Galloway's attorney, and a mistrial was declared.[2]

(1,2) Upon retrial under the original indictment, Galloway was convicted of murder with malice and sentenced to twenty years in prison. His petition for a writ of habeas

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[1]3 Vernon's Texas Code of Criminal Procedure Art. 37.07(2) (b) (1965).

[2]Under the provisions of 3 Vernon's Texas Code of Criminal Procedure Art. 37.07(2) (d) (1965), providing that in such an instance "no jeopardy shall attach."

corpus was granted by the District Court on the ground that due process prevented his being retried for murder with malice. Subsequent to the District Court's decision, the Supreme Court expanded the protections of the Fourteenth Amendment's due process clause by holding that state convictions "must be judged * * * under this Court's interpretations of the Fifth Amendment double jeopardy provision." Benton v. Maryland, 395 U.S. 784, 89 S. Ct. 2056, 23 L.Ed.2d 707, 717 (1969). We hold, as have our brethren in the Tenth Circuit,[3] that *Benton* is to be applied retroactively to retrials held before that opinion was handed down, and further that under the circumstances of this case Galloway was placed twice in jeopardy.

The Supreme Court has set up the following guideposts for determining whether or not its decisions on criminal procedure are to be given retroactive effect:

> (a) the purpose to be served by the new standards, (b) the extent of reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards.

Stovall v Denno, 388 U.S. 293, 297, 87 S.Ct. 1967, 1970, 18 L.Ed.2d 1199, 1203 (1967).

By far the most important of these factors is the purpose of the new rule. Desist v. United States, 394 U.S. 244, 89 S.Ct. 1030, 1048, 22 L.Ed.2d 248, 256 (1969); United States ex rel. Allison v. New Jersey, 418 F.2d 332 (3rd Cir. (1969); United States v. Lucia, 416 F.2d 920 (5th

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[3]Booker v. Phillips, 418 F.2d 424 (1969). *Contra*, Spidle v. State, 446 S.W.2d 793 (Mo.S.Ct. 1969).

Cir., 1969). Exclusionary rules aimed at deterring unlawful police practices have generally been made prospective only. Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965), denying retroactive effect to Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961); Johnson v. New Jersey, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966), giving only prospective application to Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). In those cases retroactive application could have done little to further the Court's aim of deterrence. But where violations of the defendant's constitutional rights have gone to the fairness of the trial itself, and especially where those violations have been correctible on a new trial, the Supreme Court has applied its rules retroactively. Thus the right of the indigent to appointed counsel enunciated in Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) has been granted retroactively, and the expanded right of confrontation of Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968) was applied retroactively in Roberts v. Russell, 392, U.S. 293, 88 S.Ct. 1921, 20 L.Ed.2d 1100 (1968).

In *Linkletter, supra,* the Supreme Court first applied the test of whether the new rule went to the "fairness of the trial." Here we are concerned with whether the defendant should be on trial at all. We conclude that the purpose of the *Benton* rule warrants retroactive application.

Nor do the second and third factors persuade us otherwise. The "reliance by law enforcement authorities" in the second factor has generally been construed to mean reliance on prior decisions by police in their out-of-court investigations. Johnson v. New Jersey, *supra;* Desist v. United States, *supra;* but see DeStefano v. Woods, 392 U.S. 631,

88 S.Ct. 2093, 20 L.Ed.2d 1308 (1968). The case at bar is entirely unrelated to police practices tailored to past decisions of the Supreme Court.

Reliance by state courts is important in the third factor, the impact of retroactivity on the administration of justice in the states. Impact may be measured by two criteria—number of convictions which would have to be reopened, which depends on how frequently the states have relied on the old standard, and other burdens on the state courts. Reversals for failure to comply with *Benton* standards should not be frequent, since "every State incorporates some form of the prohibition in its constitution or common law." *Benton, supra,* 395 U.S. at 795, 89 S.Ct. at 2063, 23 L.Ed.2d at 716. Furthermore, the viability of Palko v. Connecticut, 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288, overruled by *Benton,* has been in doubt at least since United States ex rel. Hetenyi v. Wilkins, 348 F. 2nd 844 (2d Cir. 1965) and the Supreme Court's avoidance of the incorporation question in Cichos v. Indiana, 385 U.S. 76, 87 S.Ct. 271,17 L.Ed.2d 175 (1966). Cases in which the states justifiably relied on *Palko* can be only very few. Retroactive application of *Benton* would not create the other administrative complexities contemplated in *Desist, supra,* since the determination of the factual basis of a double jeopardy claim should be a relatively simple matter.

Even if these latter two factors cut more strongly than they do in favor of prospective application only, we should not deem them controlling. *Desist, supra,* 394 U.S. at 244, 89 S.Ct. 1030, 1048, 22 L.Ed.2d at 256 (1969). "The fundamental nature of the guarantee against double jeopardy can hardly be doubted. * * * it is clearly 'fundamental to the American scheme of justice.' " *Benton, supra,* 395 U.S. at 795, 89 S.Ct. at 2063, 23 L.Ed.2d at 716-717

(1969). This guarantee protects Galloway even though his retrial was held prior to *Benton*.

Jeopardy, for purposes of the federal rule, may so attach as to prevent a second trial even after a mistrial. Any other rule would allow prosecutors to harass defendants through repeated trials or to move for a mistrial and seek a jury more favorable to the government. Downum v. United States, 372 U.S. 734, 83 S.Ct. 1033, 10 L.Ed.2d 100 (1963). Exceptions have been created in cases of "imperious necessity" or where "the ends of public justice would otherwise be defeated," Wade v. Hunter, 336 U.S. 684, 69 S.Ct. 834, 93 L.Ed. 974 (1949) (absence of witnesses from war zone); Simmons v. United States, 142 U.S. 148, 12 S.Ct. 171, 35 L.Ed. 968 (1891) (juror bias disclosed after voir dire); United States v. Perez, 22 U.S. 579, 9 Wheat. 579, 6 L.Ed. 165 (1824) (hung jury).

The District of Columbia Circuit, under peculiar circumstances, has upheld the declaration of a mistrial and subsequent retrial after the jury had rendered its verdict. In Crawford v. United States, 109 U.S.App.D.C. 219, 285 F. 2d 661 (1960), defendant was found guilty on both counts in his indictment, but some jurors informed the judge after the jury had been formally dismissed in the case that they had not had a chance to vote on one of the counts. The trial judge set aside the verdict and ordered a new trial. The Court of Appeals affirmed defendant's second conviction on both counts.

(3-6) *Crawford*, like all the other mistrial-double jeopardy cases, turns on its special facts, 285 F.2d at 662, 663; *Downum, supra*, 372 U.S. at 736, 83 S.Ct. 1033, 10 L.Ed.2d at 102-103 (1963): A mistrial may be followed by retrial "only in very extraordinary and striking circum-

stances." 372 U.S. at 736, 83 S.Ct. at 1034, 10 L.Ed.2d at 103. In *Crawford,* those exceptional circumstances were that the jury had brought in a presumptively valid verdict of guilty as charged. Any prejudice to the defendant on retrial would be minimal, since he could be convicted of no greater offense than he had been convicted of on his first trial. In the case before us, however, the first jury had refused to convict of murder with malice. The retrial subjected him to a second prosecution for an offense of which he had been impliedly acquitted.[4]

The rule that an implied acquittal bars reprosecution was enunciated in Green v. United States, 355 U.S. 184, 78 S. Ct. 221, 2 L.Ed.2d 199 (1957). Defendant in that case had been indicted for both murder in the first degree and murder in the second degree. The jury convicted him only of the latter. The Supreme Court held that the jury's failure to address itself to murder in the first degree amounted to a verdict of not guilty on that charge.

Defendant Galloway was impliedly acquitted of murder with malice by the jury's silence unless it can be established that the elements of that offense are identical to those of murder without malice, the offense of which he was con-

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[4]No other procedural barriers stand in the way of Galloway's assertion of his double jeopardy defense. Defense counsel's written consent to the mistrial does not amount to a waiver of the double jeopardy plea, since the protections of *Benton* had not yet been announced. A waiver of a constitutional right is ineffective unless made knowingly. Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). Defendant's failure to comply with Texas procedure for raising a plea of double jeopardy did not bar his assertion of that federal defense. Galloway sufficiently raised that issue by his pretrial motion to strike that part of the indictment which charged him with murder with malice and by his submission of affidavits relating the circumstances of the first trial.

victed. The state of Texas calls our attention to 2A Vernon's Texas Penal Code Art. 1256,

> Whoever shall voluntarily kill any person within this State shall be guilty of murder. Murder shall be distinguished from every other species of homicide by the absence of circumstances which reduce the offense to negligent homicide or which excuse or justify the killing.

pointing out that this definition nowhere differentiates between murder with malice and murder without malice. Article 1257a allows the defendant to introduce evidence of lack of malice, and Article 1257b provides for a five-year ceiling on imprisonment for murder without malice. Subsequent to the enactment of the above statute in repeal of the former provisions providing for degrees of murder, the Texas state courts have held that the prosecution's case is simply for murder, rather than for either murder with malice or murder without malice, so that a conviction of only murder without malice will not bar a retrial for murder with malice if the case is reversed on appeal. Beckham v. State, 148 S.W.2d 1104 (Ct.Crim.App.Tex.1941).

The state urges that Texas' interpretation of its own statute is binding upon us by virtue of Cichos v. Indiana, 385 U.S. 76, 87 S.Ct. 271, 17 L.Ed.2d 175 (1966). The Supreme Court in that case held that defendant had not been twice placed in jeopardy because the offense of which he was convicted and that on which the jury was silent were virtually identical. Cichos was convicted of reckless homicide, carrying a maximum penalty of five years' imprisonment, and the jury was silent as to the charge of vehicular homicide, which carries a possible sentence of 21 years. The Supreme Court, noting that "(b)oth crimes require proof of the same elements to sustain a conviction

under Indiana law" and that the general practice was to submit both issues to the jury with instructions to return a verdict of guilty as to no more than one, agreed with the Indiana Supreme Court that the practical effect of the submission of both charges was nothing more than to give the jury discretion in fixing a higher or lower penalty. Under the circumstances, resubmission of the issue of involuntary manslaughter on defendant's second trial did not subject him once again to possible conviction of a crime of which he had been acquitted, but merely allowed the jury to fix a higher penalty for a crime of which he had been properly convicted. The Supreme Court's approach did not take the Indiana state decisions as controlling, but merely looked to them for guidance as to the relationship between the crimes charged.

(7) We are bound not by the pronouncements of the Texas courts on the double jeopardy effect of a retrial for murder with malice, but by Texas law on the relationship of the two offenses as it affects the implied acquittal doctrine. One recent case severely undercuts the state courts' identity doctrine as to the murder statute. In Welcome v. State, 438 S.W.2d 99 (Ct.Crim.App.Tex. 1969), Judge Onion held that a conviction for the lesser included offense of assault with intent to murder without malice would bar a prosecution on retrial after appeal for assault with intent to murder with malice. He distinguished the murder statute on the grounds that the legislature had manifested its intent to create two different offenses called "assault" by providing separate maximum and minimum sentences for each

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[5]The state calls our attention to Walton v Beto, (Civ.No.4989, E.D.Tex., June 5, 1969), which relied on *Welcome* in upholding a conviction similar to Galloway's. The district court in *Walton* did not have the benefit of *Benton*, which later that month applied federal double jeopardy standards to state prosecutions.

offense, and by limiting a double penalty provision to convictions for murder without malice. 438 S.W.2d at 105.

(8-10) The rule of *Cichos* is that such differing penalty provisions are not controlling as to whether a defendant has been twice placed in jeopardy. Our inquiry should be directed instead to whether the elements of the crimes charged are the same. There can be little doubt that murder with malice and murder without malice are separate and distinct offenses under Texas law. Once the defendant satisfies his burden of going forward with evidence of lack of malice, the state must prove beyond a reasonable doubt that defendant acted with malice aforethought. McNeil v. State, 154 S.W.2d 653 (Ct.Crim.App.Tex.1941); Swilley v. State, 25 S.W.2d 1098 (Ct.Crim.App.Tex.1929). Should the state prove every other element in its case, if it fails this burden it has proved murder without malice. If it carries this burden, it has proved a new element and in effect a new offense, that of murder with malice. The state may not have the opportunity once again to prove that element once it has gone to the jury and failed. Galloway's retrial for murder with malice placed him twice in jeopardy in violation of the Fourteenth Amendment.

The judgment of the District Court is affirmed.

APPENDIX "B"

Robert Chester GALLOWAY, Petitioner,

v.

Dr. George J. BETO, Director, Texas Department of Corrections, Respondent.
Civ. A. No. 3-2649.

United States District Court
N. D. Texas,
Dallas Division.
Feb. 10, 1969.

Habeas corpus proceeding brought by petitioner seeking release from confinement in Texas department of corrections. The District Court, Hughes, J., held that where petitioner had been convicted of murder without malice following full trial in Texas court, even though jury was unable to agree on penalty, state was constitutionally forbidden to reprosecute petitioner for murder with malice and, in so doing, it deprived petitioner of his liberty without due process of law.

Habeas corpus granted.

1. Habeas Corpus, Key No. 90

That state court of criminal appeals did not have before it, in habeas corpus proceeding, transcript of petitioner's first trial did not ipso facto deprive petitioner of any of his constitutional rights.

2. Criminal Law, Key No. 867

Trial judge did not abuse his discretion by declaring mis-

trial without accused's consent after jury had deliberated approximately three hours on punishment for murder without malice.

3. Constitutional Law, Key No. 260

Due process clause of Fourteenth Amendment bars reprosecutions for same offense if such procedure is fundamentally unfair. U.S.C.A.Const. Amend. 14.

4. Criminal Law, Key No. 161

State reprosecution for same offense is fundamentally unfair if in effect two chances are allowed state to convict an accused of the same offense. U.S.C.A.Const. Amend. 14.

5. Constitutional Law, Key No. 260.

Where petitioner had been convicted of murder without malice following full trial in Texas court, even though jury was unable to agree on penalty, state was constitutionally forbidden to reprosecute petitioner for murder with malice and, in so doing, it deprived petitioner of his liberty without due process of law. Vernon's Ann.Tex.C.C.P. art. 37.07, subd. 2(d); U.S.C.A.Const. Amend. 14.

6. Criminal Law, Key No. 195(1)

Under Texas law, murder with malice and murder without malice are not comprised of same elements of proof and therefore are separate offenses for purposes of application of federal constitutional standards applicable to reprosecution.

7. Constitutional Law, Key No. 260
Criminal Law, Key No. 162

To extent that Texas Code of Criminal Procedure au-

thorized reprosecution of petitioner convicted of murder without malice for murder with malice when jury was unable to agree upon sentence, article was inconsistent with due process clause of the Fourteenth Amendment. Vernon's Ann.Tex.C.C.P. art. 37.07, subd. 2(d); U.S.C.A.Const. Amend. 14.

Fred Time, Dallas, Tex., for petitioner.

Crawford C. Martin, Atty. Gen. of Texas, and Robert C. Flowers and Howard M. Fender, Asst. Attys. Gen., for State of Texas.

HUGHES, District Judge.

This cause came on for hearing on the 10th day of February, 1969 and the Court after considering the record, the brief of Petitioner, oral argument of counsel, enters the following Findings of Fact and Conclusions of Law.

Findings of Fact

1. This is a habeas corpus proceeding in which the Petitioner, Robert Chester Galloway, seeks release from confinement in the Texas Department of Corrections under a final conviction in a felony case.

2. On June 20, 1968 Petitioner applied to this Court for a writ of habeas corpus and the State answered on July 22, 1968.

3. Prior to June 20, 1968 Petitioner, alleging substantially identical grounds, applied for a writ of habeas corpus in the Criminal District Court of Dallas County, Texas. The trial judge denied the petition without a hearing and without findings of fact and conclusions of law. The Texas

Court of Criminal Appeals examined the record and denied relief without written opinion.

4. There are no material factual issues.

5. In its answer the State admits the following facts alleged in Petitioner's application:

> Petitioner was convicted on June 23, 1966 in the Criminal District Court of Dallas County of the offense of murder with malice. His punishment was assessed by the jury at twenty years confinement in the Texas Department of Corrections. On May 25, 1966 at a prior trial under the same indictment, Petitioner was found guilty of murder without malice but the jury deadlocked on the subject of punishment. The judge with the consent of Petitioner's counsel discharged the jury after three hours deliberation on the subject of punishment.

6. Petitioner's attorney and the State's attorney appeared at a pretrial conference in this cause held on September 17, 1968. At the proceeding Petitioner's attorney introduced into evidence an affidavit signed by Petitioner, in which Petitioner swore among other things that he had not agreed to the discharge of the jury in his first trial. At this same hearing Petitioner's attorney introduced several exhibits and his personal affidavit which together evidenced that a Statement of Facts of Petitioner's first trial had been prepared for inclusion in the record on appeal to the Court of Criminal Appeals but was lost or misplaced before it was received by that Court.

7. At the hearing on September 17, 1968 the court requested the State's attorney to reply to Petitioner's brief by October 15, 1968. The State's attorney was thereafter granted numerous extensions until January 20, 1969, the Court

was advised by letter that his office had suspended work on the brief and chose to rely instead on a recent opinion by the Texas Court of Criminal Appeals, Welcome v. State, 438 S.W.2d 99, (Delivered January 8, 1969), which opinion was felt to be dispositive of the case. (*Welcome* cited with approval earlier Texas decisions holding that murder with malice and murder without malice are not separate offenses).

8. Petitioner contends:

(1) He was denied due process of law as required by the fourteenth amendment of the United States Constitution because a full and complete transcript of all proceedings was not before the Court of Criminal Appeals.

(2) His retrial and conviction for murder with malice unconstitutionally subjected him to double jeopardy in violation of the fourteenth amendment. Petitioner is actually asserting two separate double jeopardy arguments:

(a) That he could not constitutionally be retried and convicted for the offense of murder with malice following the failure of the first jury to convict him of that offense; and

(b) That he could not constitutionally be retried for the offense of murder with malice or any lesser offense for which he could have been convicted under the indictment charging murder with malice, because the trial judge abused his discretion in declaring a mistrial without Petitioner's consent after only three hours of deliberation on the issue of punishment.

Conclusions of Law

1. Since there are no material factual disputes, there is no need for an evidentiary hearing in this cause.

(1) 2. Petitioner was not, *ipso facto*, deprived of any of his constitutional rights because the Court of Criminal Appeals did not have before it the transcript of his first trial.

(2) 3. The trial judge did not abuse his discretion by declaring a mistrial without Petitioner's consent after the first jury had deliberated approximately three hours on the punishment for murder without malice. (Therefore, it is not necessary to decide whether the rule of Downum v. United States, 372 U.S. 734, 83 S. Ct. 1033, 10 L.Ed.2d 100, applies to the States or whether Petitioner waived this particular jeopardy defense.)

(3) 4. The Due Process Clause of the fourteenth amendment bars state reprosecutions for the same offense if such procedure is fundamentally unfair. United States, ex rel. Hetenyi v. Wilkins, 2d. Cir.1965, 348 F.2d 844.

(4) 5. It is fundamentally unfair according to present day values to allow the State (federal or local) in effect two chances to convict an accused of the same offense. See Green v. United States, 355 U.S. 184, 78 S.Ct. 221, 2 L. Ed.2d 199 (1957) and *Wilkins, supra*.

(5) 6. Although Petitioner was not actually acquitted of murder with malice, the original jury clearly refused to convict him of that offense when it returned a verdict of murder without malice following a full trial.

7. The subsequent failure of the original jury to agree on a penalty for murder without malice is irrelevant to the fact that it failed to convict Petitioner of murder with malice following a full trial.

8. The legitimate state interests can be fully protected

by permitting Petitioner to be retried on an indictment charging no offense greater than murder without malice.

(6) 9. Murder with malice and murder without malice are not comprised of the same elements of proof and therefore are separate offenses for purposes of the application of federal constitutional standards.

(7) 10. Texas was constitutionally forbidden to reprosecute Petitioner for murder with malice and to the extent that Article 37.07(2) (d) of the Vernon's Ann.Texas Code of Criminal Procedure authorizes such a reprosecution, it is inconsistent with the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

11. Petitioner has been deprived of his liberty without due process of law, and therefore he is being held in custody in violation of the United States Constitution.

It is therefore, ordered that the petition of Robert Chester Galloway for a writ of habeas corpus is granted and that he be released from custody unless within 60 days Texas affords him a new trial that conforms to the principles set forth above.

APPENDIX "C"

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 27461

ROBERT CHESTER GALLOWAY,
Plaintiff-Appellee,

versus

DR. GEORGE J. BETO, Director
Texas Department of Corrections,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(April 8, 1970)

Before THORNBERRY, GODBOLD, and MORGAN Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the

Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is also DENIED.

APPENDIX "D"

CODE OF CRIMINAL PROCEDURE

Art. 37.07 (693) (770) (750) Verdict must be general; separate hearing on proper punishment

. . .

2. Alternate procedure

. . .

(b) If a finding of guilty is returned, it shall then be the responsibility of the judge to assess the punishment applicable to the offense; provided, however, that (1) in capital cases where the state has made it known in writing prior to trial that it will seek the death penalty, (2) in any criminal action where the jury may recommend probation and the defendant filed his sworn motion for probation before the trial began, and (3) in other cases where the defendant so elects in writing at the time he enters his plea in open court, the punishment shall be assessed by the same jury. If a finding of guilty is returned, the defendant may, with the consent of the attorney for the state, change his election of one who assesses the punishment.

. . .

(d) In cases where the matter of punishment is referred to the jury, the verdict shall not be complete until the jury has rendered a verdict both on the guilt or innocence of the defendant and the amount of punishment, where the jury finds the defendant guilty. In the event the jury shall fail to agree, a mistrial shall be declared, the jury shall be discharged, and no jeopardy shall attach.

APPENDIX "E"

Robert Chester GALLOWAY, Appellant,

v.

The STATE of Texas, Appellee.
No. 40604.

Court of Criminal Appeals of Texas.
Oct. 18, 1967.
Rehearing Denied Dec. 6, 1967.

Appeal from conviction of murder with malice in Criminal District Court, Dallas County, J. Frank Wilson, J. The Court of Criminal Appeals, Onion, J., held that former jeopardy, raised for first time in defendant's second motion for new trial, was not properly before the court, and former jeopardy could not attach when mistrial was declared before punishment was assessed. The court also held that murder without malice is not a lesser included offense of murder, and that murder weapon was not the product of illegal search.

Judgment affirmed.

1. Criminal Law, Key No. 290,295

Burden is on defendants to establish plea of jeopardy; the plea must be specially pleaded in writing. Vernon's Ann.C.C.P. arts. 27.05, 27.06.

2. Criminal Law, Key No. 296

Since there was no showing that defendant offered evidence in support of plea of double jeopardy he waived any right he had to a jury finding on whether his plea was true.

3. Criminal Law, Key No. 291,913(6)

Former jeopardy must be pleaded before the trial and cannot be raised for the first time on motion for new trial. Vernon's Ann.C.C.P. art. 40.09, subds. 1, 2.

4. Criminal Law, Key No. 1128(1)

Where defendant attached affidavit to supplemental brief on appeal filed in trial court stating that he had been placed on trial for murder and jury found him guilty of murder without malice, but jury was unable to agree upon punishment and was discharged by court and that appellant did not personally consent to discharge, but nothing in affidavit nor allegations in defendant's second amended motion for new trial reflected that previous trial was upon same accusation as in case at bar, and charge of court, verdict of jury, etc., did not appear as part of record, question of former jeopardy was not before reviewing court. Vernon's Ann.C.C.P. art. 40.09, subds, 1, 2.

5. Criminal Law, Key No. 182

Where a previous jury was discharged and a mistrial declared before punishment was assessed no final verdict was adjudged against defendant and former jeopardy does not attach. Vernon's Ann.C.C.P. art. 37.07, subd. 2(d).

6. Criminal Law, Key No. 185

Accused is not twice put in jeopardy when he is tried a second time after the jury impaneled for his first trial is discharged for its failure to agree on a verdict. U.S. C.A. Const. Amend. 5; Vernon's Ann.St. Const. art. 1, § 14.

7. Indictment and Information, Key No. 191(4)

Murder without malice is not a lesser included offense

of murder. Vernon's Ann. P.C. art. 1256; Vernon's Ann. C.C.P. art. 37.14.

8. Homicide, Key No. 7

Statute provides different punishments for murder with and without malice aforethought, but does not create two offenses, only the single offense of murder. Vernon's Ann. P.C. art. 1256.

9. Searches and Seizures, Key No. 7(27)

Murder weapon that was given to officers by defendant after officers inquired of defendant where the pistol was and defendant replied it was in his home and invited officers to come with him while he got it and defendant handed pistol to officers was not the product of an unlawful search and seizure.

10. Criminal Law, Key No. 1144(18)

Defendant's affidavit that he was not present at hearing on motion for new trial was not sufficient to overcome express recitation of order, overruling motion for new trial, that defendant and counsel were personally present in court at the time and the statutory presumption of appellant's presence. Vernon's Ann.C.C.P. art. 33.03.

Marks, Time & Aranson, by Fred Time, Dallas, for appellant.

Henry Wade, Dist. Atty., Tom Reese, Charles Caperton and Kerry P. FitzGerald, Asst. Dist. Attys., Dallas, and Leon B. Douglas, State's Atty., Austin for the State.

OPINION

ONION, Judge.

The offense is murder with malice; the punishment assessed by the jury, twenty (20) years confinement in the Texas Department of Corrections.

On Saturday evening, November 20, 1965, Bernie Miles (the deceased), Maurice Thornton, Chester Wilson, and Annie Pearson were sitting at a table near the stage in Delmonico's, a Dallas nightclub. Near closing time appellant and one Acreston Henry ("Sixteen") and others began the performance of the last floor show with "Sixteen" playing the part of a woman. When "Sixteen" appeared in a dress the deceased pulled him from the stage, whirled him around, and lifted him back on the stage saying, "Hey, man, look at these punks." "Sixteen" then draped his skirts over the deceased's head. Appellant told the deceased to "knock it off" and several words, remarks, etc., were exchanged, and finally the show was forced to halt because of the disturbance and the closing time. There was testimony that during the floor show a man called "Greasy" (Azzie Sullivan) handed appellant a gun, which was being used in the comedy act, and that appellant took the blank shells out of the gun. At approximately 1:15 a.m., November 21, 1965, Maurice Thornton, Chester Wilson, and Annie Pearson left the club followed by Bernie Miles, the deceased. The details of what occurred outside are conflicting; however, the evidence is uncontroverted that appellant struck the deceased on the head with the pistol and shortly thereafter shot the deceased, who died soon after his arrival at Parkland Hospital.

Appellant initially urges that as a result of a previous trial, he was placed in jeopardy when he was re-tried in

violation of Article V, U. S. Constitution, and Article I, Section 14, Texas Constitution, Vernon's Ann.St.

(1) Normally, the defense of former jeopardy must be specially pleaded, 16 Tex. Jur.2d, Sec. 321, p. 500, and the burden of proof is on the accused to establish a plea of jeopardy. Skelton v. State, 110 Tex.Cr.R. 621, 10 S.W.2d 554. We do not find that appellant filed and presented to the court a written plea of former jeopardy as required by Articles 27.05 and 27.06, Vernon's Ann.C.C.P.

(2) Even if it be appellant's contention that no formal plea is necessary where the former proceedings are in the same case, there is no showing in the record that appellant offered evidence in support of his plea, and thus he waived any right he had to a jury finding on whether his plea of former jeopardy was true. Villarreal v. State, 172 Tex.Cr.R. 213, 355 S.W.2d 516.

(3) The first mention of such issue appears to have been made in appellant's Second Amended Motion for New Trial filed in the trial court. If evidence were presented in connection with said motion, it does not appear in the record. In Watson v. State, 162 Tex.Cr.R. 156, 282 S.W.2d 715, this Court held that former jeopardy must be pleaded before the trial and cannot be raised for the first time on Motion for New Trial.

(4) Appellant has attached an affidavit to his supplemental brief on appeal filed in the trial court, stating that on May 25, 1966, he was placed on trial for murder in the Criminal District Court of Dallas County; that the jury found him guilty of murder without malice, but that the jury after three hours of deliberation at the penalty stage of the proceedings was unable to agree upon punishment

and was discharged by the court, with consent of appellant's counsel; that appellant did not personally consent to such discharge.

Nothing in the said affidavit nor the allegations in the Second Amended Motion for New Trial reflect that the previous trial was upon the same accusation as in the case at bar. If a previous trial were had upon this indictment, the charges of the court, the verdict of the jury, etc., do not appear as a part of the record, nor do we find any request for the inclusion of the same in the record. Article 40.09, Sections 1 and 2, V.A.C.C.P.

For the reasons stated above, the question of former jeopardy or conviction is not before this Court. Hill v. State, Tex.Cr.App., 398 S.W.2d 944; Villarreal v. State, supra.

In his second ground of error appellant complains that the trial court erred in denying his pretrial motion to reduce the offense from murder with malice to murder without malice, contending that the verdict upon appellant's alleged first trial where he was adjudged guilty of murder without malice should be considered an acquittal of the higher offense of murder with malice and that, therefore, appellant could not be convicted of any greater offense than murder without malice. Appellant cites Article 37.14, V.A.C.C.P. (1965) in support of this contention.

(5) The record does not reflect the referred to verdict or any instruments or evidence showing that appellant had been previously adjudged guilty of murder without malice on this same accusation. Therefore, the question is not before this Court for consideration. Even if the question were before this Court and assuming the truth of appellant's allegations (see discussion under appellant's ground of error

No. 1) that a previous jury was discharged and a mistrial declared before punishment was assessed, the conclusion is inescapable that no final verdict of murder without malice was adjudged against appellant. Article 37.07(2) (d), V.A.C.C.P.

This article states:

> "In cases where the matter of punishment is referred to the jury, the verdict shall not be complete until the jury has rendered a verdict both on the guilt or innocence of the defendant and the amount of punishment, where the jury finds the defendant guilty. In the event the jury shall fail to agree, a mistrial shall be declared, the jury discharged, and no jeopardy shall attach."

(6-8) It is also observed that an accused is not twice put in jeopardy within the meaning of the Fifth Amendment when he is tried a second time after the jury impaneled for his first trial was discharged for its failure to agree on a verdict. Downum v. United States, 372 U.S. 734, 83 S.Ct. 1033, 10 L.Ed.2d 100; Gilmore v. United States, 264 F.2d 44 (5th Cir), cert. den. 359 U.S. 994, 79 S.Ct. 1126, 3 L.Ed.2d 982, reh. den. 360 U.S. 914, 79 S.Ct. 1298, 3 L.Ed.2d 1264. Further, this Court has long held that murder without malice is not a lesser included offense of murder. Lopez v. State, 162 Tex.Cr.R. 454, 286 S.W.2d 424; Hall v. State, 145 Tex.Cr.R. 192, 167 S.W.2d 532; Mosley v. State, 149 Tex.Cr.App. 523, 196 S.W.2d 822. The statute (Article 1256, V.A.P.C.) provides different punishments for murder with and without malice aforethought, but does not create two offenses, only the single offense of murder. See 29 Tex.Jur.2d., Homicide, Sec. 77, pp. 83, 84.

(9) In his third ground of error appellant contends that the trial court erred in admitting into evidence over

objection a .22 caliber pistol which was the product of an illegal search and seizure.

B. W. Pope, a Dallas city policeman, testified that he and two other officers accompanied by "Sixteen" and "Greasy" went to appellant's residence at 1:30 p.m. on the afternoon following the shooting. Officer Pope observed appellant backing his automobile into the street. Pope identified himself and inquired of the appellant where the pistol was he had used in the shooting the night before. Appellant replied that it was in his house, and he invited the officers to come with him while he got it. Appellant and the officers went into appellant's house, and appellant handed to the officers the pistol and ammunition that he removed from the headboard of a bed. The appellant was subsequently arrested. Such testimony is undisputed.

In view of such facts, we overrule appellant's contention that the pistol was procured as a result of an unlawful search of appellant's home. Hinkley v. State, Tex.Cr.App., 389 S.W.2d 667.

(10) In his final ground of error appellant complains that the trial court erred in overruling appellant's Second Amended Motion for New Trial in the absence of appellant.

The record shows that the appellant was present during the trial, and there is no evidence reflecting his absence at any time. The presumption is that he was present during the whole trial. See Article 33.03, V.A.C.C.P. The order overruling the appellant's Motion for New Trial expressly recites that the appellant and his counsel were personally present in court at the time. After notice of completion of the record by the clerk, there was no objection made to the same or any request for a hearing to correct the record. See

Article 40.09, Sec. 7, V.A.C.C.P. Appellant's affidavit to the effect that he was not present at the hearing on the said Motion for New Trial attached to a supplemental brief on appeal filed in the trial court after the approval of the record is not sufficient to overcome the express recitation of the order overruling the Motion for New Trial and the presumption of appellant's presence. Appellant's contention is overruled.

The judgment is affirmed.

APPENDIX "F"

29 Tex Jur 2d Homicide

B. MURDER

§ 77. In general.

The Penal Code provides that whoever voluntarily kills a person within the state is guilty of murder, and that murder is to be distinguished from every other species of homicide by the absence of circumstances that reduce the offense to negligent homicide or that excuse or justify the killing.[8] That part of the statute that distinguishes murder from other homicides is no part of the definition of murder and amounts to no more than a general rule for the purpose of aiding and guiding the court in determining whether the offense is murder or one of the lesser degrees of homicide, so that the charge may be framed accordingly. It is a suggestion to the judge, rather than a help to the jury.[9] The word "voluntarily" carries with it the intention to commit the offense charged.[10] The intent to kill is either presumed or established by the facts.[11] Decisions indicate that every intentional killing without justification or excuse is murder.[12]

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[8]PC art 1256.

[9]Neyland v State 13 Crim Rep 536.

[10]Becks v State 158 Crim Rep 204, 254 SW2d 396.

[11]Watson v State 148 Crim Rep 589, 189 SW2d 1020.

[12]Lovelady v State 150 Crim Rep 50, 198 SW2d 570; Brown v State 153 Crim Rep 1, 216 SW2d 226, reh den; Becks v State 158 Crim Rep 204, 254 SW2d 396.

This provision makes all unlawful killings above the grade of negligent homicide murder,[13] including homicides that formerly would have been manslaughter.[14]

The offense of manslaughter no longer exists.[15] And manslaughter is no longer a defense against murder, nor are its constituents properly given in a charge to the jury.[16] What was formerly two species of unlawful homicide was combined into one definition.[17]

When the legislature repealed the manslaughter statutes,[18] all statutes that specified certain acts as constituting adequate cause were also repealed.[19]

The statute provides different punishments for murder with and without malice aforethought.[20] The statute does not create two offenses, but only the single offense of

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[13]Guajardo v State 113 Crim Rep 570, 24 SW2d 56.

[14]Friday v State 117 Crim Rep 37, 36 SW2d 1036.

[15]Flores v State 109 Crim Rep 261, 4 SW2d 43; Gatlin v State 113 Crim Rep 247, 20 SW2d 431 (where it is said that elements of manslaughter have been eliminated).

[16]Guajardo v State 113 Crim Rep 570, 24 SW2d 56.

[17]Miller v State 112 Crim Rep 125, 13 SW2d 865.

[18]PC arts 1244-1255.

[19]Berry v State 143 Crim Rep 67, 157 SW2d 650.

Judicial conclusion or declaration that offense of manslaughter still remained part of law of this state would be perversion of facts. Chapter 60, Acts of 42nd Legislature, Regular Session (PC art 1257c), was not to re-enact law of manslaughter, but was intended to clarify legislative meaning in enactment of article 1257a. Stephens v State 125 Crim Rep 397, 68 SW2d 181.

[20]See PC Art 1257b.

murder;[1] the penalty depends on whether the jury find that there were mitigating facts on which a conclusion can be based that in committing the homicide the accused acted without malice.[2] Though murder was at one time divided into murder of the first degree and murder of the second degree,[3] degrees of murder do not exist under the present statute.[4]

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[1]Pruitt v State 114 Crim Rep 281, 25 SW2d 870; Herrera v State 117 Crim Rep 389, 36 SW2d 515; Conway, In re 118 Crim Rep 148, 37 SW2d 1017; Morgan v State 121 Crim Rep 424, 49 SW2d 788; Chappell v State 124 Crim Rep 187, 61 SW2d 842; Stephens v State 125 Crim Rep 397, 68 SW2d 181; Hill v. State 126 Crim Rep 79, 69 SW2d 409; Lopez v State 162 Crim Rep 454, 286 SW2d 424.

[2]Morgan v State 121 Crim Rep 424, 49 SW2d 788.

[3]*Degrees of murder were abolished* by Acts 33d Leg. Chap 116, Hunt v State 123 Crim Rep 559, 59 SW2d 836.

There are now no degrees of crime of murder. One convicted of murder that jury found was committed without malice may, on re-trial, be convicted of murder with malice and punishment fixed accordingly. Mosley v. State 149 Crim. Rep. 523, 196 S.W.2d 822.

Criminal homicide in Texas, 16 Tex. L.R. 305.

[4]Lovelady v. State, 150 Crim. Rep. 50, 198 S.W.2d 570; Lopez v. State, 152 Crim Rep. 562, 216 S.W.2d 183, reh. den.

APPENDIX "G"

HISTORY OF TEXAS MURDER LAW

Title 15 of the Texas Penal Code (1925) relates to offenses against the person, Chapter 15 of said Title 15 which related to manslaughter — was repealed by Act of the 40th Legislature in 1927. Acts 40th Leg., p. 412, Ch. 274, Sec. 3.

Manslaughter was defined in Art. 1244 of said Title and Chapter as voluntary homicide committed under the immediate influence of sudden passion arising from an adequate cause, but neither excused nor justified.

Sec. 1 of the 1927 Act amended Arts. 1256 and 1257 of Chapter 16, eliminating malice aforethought from the definition of murder and reduced the punishment from 5 years to 2 years.

Sec. 2 of said 1927 Act enacted Art. 1257-a which relates to evidence which the state or the defendant may offer "in all prosecutions for felonious homicide."

In addition to repealing Chapter 15 Title 15 relating to manslaughter and all other laws in conflict with the Act, Sec. 3 of the 1927 Statute repealed Chapter 18 of Title 15 of the 1925 Code which contained general instructions relating to homicide.

Sec. 3-a of the 1927 Act reads as follows:

> "In all cases tried under the provisions of this Act, it shall be the duty of the Court to define 'malice aforethought' and shall apply that term by appropriate

charge to the facts in the case and shall instruct the Jury that unless from all the facts and circumstances in evidence the Jury believes the Defendant was prompted and acted with his malice aforethought, they cannot assess the punishment at a period longer than five years."

...

This portion of the 1927 Act was amended at a Special Session of the 40th Legislature by addition of a savings clause (Acts 40th Leg. 1st C.S., p. 18, Ch. 8) and has been designated by Vernon as Art. 1257-b V.A.P.C.

The Caption of the 1927 Act reads:

"An Act amending Articles 1256 and 1257 of the Penal Code of 1925, so as to properly define murder, and fixing the punishment for murder; inserting in the Penal Code a new article numbered 1257-a relating to what may be proved and considered by the jury, in determining the punishment to be assessed for murder; repealing Chapter 15 of Title 15 of the Penal Code of 1925, relating to manslaughter, and all other laws in conflict with this Act, repealing Chapter 18 of Title 15 of the Penal Code of 1925; and declaring an emergency."

It is interesting to note that the Caption gives no notice of the enactment of a statute or notice that the provision of Section 3-a was to be enacted as a statute defining a separate offense.

The constitutionality of the murder statute was upheld by the Texas Court of Criminal Appeals as early as 1928. See Davis v. State, 10 S.W. 2d 116, and Crutchfield v. State, 10 S.W. 2d 119.

In the latter case Judge Lattimore, speaking for this Court, said:

". . . . Referring to chapter 274, Gen. & Sp. Acts Reg. Sess. 40th Leg., we note that every voluntary killing of a human being, if there be no circumstances reducing the offense to negligent homicide, or excusing or justifying such killing, would be murder. The former law was identical, save that it used the expression 'with malice aforethought,' where now appears in the statute the word 'voluntarily,' and it also included manslaughter in the inferior offenses referred to in the latter part of the article. We perceive no reason for holding that the law-making body, which put 'malice aforethought' into its definition of murder at a former time, might not now take it out and substitute for said expression the word 'voluntarily.' With the wisdom of the change we have nothing to do, but are fully of opinion that it was within the power of the Legislature, and that there appears in our Constitution no such limitation upon said power as would be transgressed by making such change.

"Under the new law, every voluntary killing, unattended by circumstances which reduce the offense to negligent homicide, or which excuse or justify the act, is murder, and punishable as set out in the statutes. Aside from the repealing part of chapter 274, supra, it adds two procedure provisions to our murder statute — one providing that all relevant facts as to the previous relations between the accused and the deceased, also those facts going to show the condition of the mind of the accused, as well as these facts relevant to the guilt or innocence of the accused, should be held admissible; the other making it the duty of the trial court in every murder case to define malice aforethought, and to apply that term by appropriate charge to the facts of the case, as well as to instruct the jury that they cannot assess the punishment at more than five years in the penitentiary, unless they believe from the evidence before them that the accused acted with malice aforethought in committing the homicide."

In 1931, some four years after the act amending Arts.

1256 and 1257 and enacting Art. 1257-a and including Sec. 3-a, and after these opinions had been handed down, the Legislature amended Sec. 3-a of said act (Acts 1931, p. 94) by adding Section 3-b which reads:

> "In all cases tried under the provisions of this Act it shall be the duty of the Court, where the facts present the issue of murder without malice, to instruct the jury that murder without malice is a voluntary homicide committed without justification or excuse under the immediate influence of a sudden passion arising from an adequate cause, by which it is meant such cause as would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper sufficient to render the mind incapable of cool reflection, and in appropriate terms in the charge to apply the law to the facts as developed from the evidence."

This statute has been designated by the publishers and now appears as Art. 1257c V.A.P.C.

At the same time the Legislature amended Sec. 3-a of the 1927 Act it amended Art. 1160 P.C. defining an assault with intent to murder (Acts 1933, p. 95) which prior to the amendment read:

> "If any person shall assault another with intent to murder, he shall be confined in the penitentiary not less than two nor more than 15 years; if the assault be made with a bowie knife or dagger or in disguise, or by laying in wait, or by shooting into a private residence, the punishment shall be double."

As amended this statute, which now appears as Art. 1160 V.A.P.C., reads:

> "If any person shall assault another with intent to murder, he shall be confined in the penitentiary not

less than two nor more than fifteen years; provided that if the jury find that the assault was committed without malice, the penalty assessed shall be not less than one nor more than three years confinement in the penitentiary; if the assault be made with a bowie-knife or dagger, or in disguise, or by laying in wait, or by shooting into a private residence, the punishment shall be double.

"Sec. 2. Upon the trial of any person for assault with intent to murder, the Court, in its charge to the jury, shall define malice aforethought and in a proper case murder without malice, and instruct the jury touching the application of the law to the facts."

It was this 1933 statute which was construed in Welcome v. State, 438 S.W. 2d 99, and the prior opinions which were overruled in Welcome.

Whether the construction in Welcome was correct or not, it is certain that the prior opinions construing the murder statute were not overruled.

It was the 1927 statute, not the 1933 amendment (Art. 1257c) which added Section 3b (Art. 1257b) which has been construed by the Texas Court of Criminal Appeals uniformly and without dissent as providing one offense.

Cases holding that murder under the Texas Statute does not embrace two offenses and there is but one offense that is murder include the following:

Pruitt v. State	25 S.W. 2d 870
Herrera v. State	36 S.W. 2d 515
Ex parte Conway	37 S.W. 2d 1017
Morgan v. State	49 S.W. 2d 788
Chappell v. State	61 S.W. 2d 842
Stephens v. State	68 S.W. 2d 181
Hill v. State	69 S.W. 2d 409

Joubert v. State	124 S.W. 2d	368
Beckham v. State	148 S.W. 2d	1104
Mosley v. State	196 S.W. 2d	822
Lovelady v. State	198 S.W. 2d	570
Lopez v. State	286 S.W. 2d	424

See also 29 Texas Jur. 2d 83, 84.

The uniform holding of the Texas Court of Criminal Appeals, the Court of Last Resort in Criminal Matters, was aptly stated by Judge Lloyd Davidson in Lopez v. State, supra.

> "Under our present murder statute, there is but one offense, and that is murder. Chappell v. State, 124 Tex.Cr.R. 187, 61 S.W. 2d 842; Joubert v. State, 136 Tex.Cr.R. 219, 124 S. W. 2d 368.
>
> "Indeed, in the Joubert case it was held that where one is convicted of murder without malice and the conviction is set aside he may be convicted of murder with malice upon a subsequent trial.
>
> "The aforementioned holding demonstrates the fact that the question of malice relates only to penalty and is not a part of the offense.
>
> "The jury having found appellant guilty of murder, their verdict is sufficient."